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## APPLICABILITY OF LEX LOCI CONTRACTUS TO IMPOSE PARTNERSHIP LIABILITY ON STOCKHOLDERS OF AN UNREGISTERED FOREIGN CORPORATION.

The broad assertion of text-writers, frequently made, that the individual liability for corporate debts is to be determined exclusively by the law of the state of incorporation,[1] does not appear to be fully justified by an adequate analysis of the problem involved or a more complete survey of the authorities relating thereto.[2] The decision reached in a recent Tennessee case, *Cunnyngham v. Shelby*,[3] is directly in point. The defendants

[1] Westlake, *Priv. Int. Law* (5th ed., 1912) pp. 407-408; Beale, *Foreign Corporations*, sec. 442; but see Clark, *Corporations* (ed. Wormser, 1916) pp. 736-738.

[2] Prof. Wesley N. Hohfeld, The Individual Liability of Stockholders and the Conflict of Laws (1910) 10 COL. L. REV. 294, n. 24.

[3] (1916) 188 S. W. (Tenn.) 1147.

were stockholders in a Delaware corporation which had carried on business in Tennessee without having attempted to comply with the statutory requirements as to foreign corporations. The plaintiffs, who had been employed by the corporation, sought to hold the stockholders liable as partners. The courts of Tennessee sustained this claim.

At the outset of an analysis of the problem involved, it is important to note that we are not now concerned with the *internal* affairs of the foreign corporation, or with the rights, privileges, powers and immunities of the stockholders in relation "to the corporation." When we remove the fiction or veil of "corporate entity," such relations prove to be in reality the jural relations of the stockholders *inter se.* The internal organization and government of foreign corporations are, of course, to be regulated according to the law of the place of incorporation.[4] It would seem equally clear that the extent and nature of the stockholders' jural relations to one another should be determined by the same law; that is, the law under which the corporate agreement was made and the conditions of membership fixed.[5]

The obligations and liabilities of stockholders "to the corporation," i. e., *inter se,* to pay the amount of an assessment, or to pay their ratable share of a corporate debt under an individual liability to contribution in favor of other stockholders

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[4] *Miles v. Woodward* (1896) 115 Cal. 308, 311; see *Williams v. Gaylord* (1902) 186 U. S. 157, 165, affirming s. c. (1900) 102 Fed. 372, 375; *London, etc., Bank v. Aronstein* (1902) 117 Fed. 601, 609.

[5] *Nashua Savings Bank v. Anglo-American, etc., Co.* (1903) 189 U. S. 221; *Allen v. Fairbanks* (1891) 45 Fed. 445; *Morris v. Glen* (1888) 87 Ala. 628; *Lewisohn v. Stoddard* (1906) 78 Conn. 575. These cases all relate to internal matters or to the obligations and liabilities of the stockholders "to the corporation"; but they are sometimes erroneously cited for the (broad) proposition that the law of the place of incorporation determines the existence (or non-existence), nature, and extent of stockholders' individual obligations to corporation creditors.

Compare Morawetz, *Priv. Corp.* (2d ed.) Vol. II, sec. 967: "The word 'charter' is here used to signify the agreement between the shareholders of the corporation, whether this agreement be in a special act of the legislature, or in articles of association, or in either of these taken in connection with certain general laws of the state. . . . The laws of the state where the corporation was formed by the agreement of the corporators are regarded only so far as they determine the scope and validity of this agreement itself. The same rule would apply to a general or limited partnership formed by agreement in one state for the purpose of carrying on business in other states."

are fundamentally different from direct obligations and liabilities to corporation creditors, whether the obligation and liabilities be corporate so-called (i. e., "quasi-joint")[6] or individual (several). Courts and text-writers have not infrequently overlooked these distinctions. The problem in all cases similar to *Cunnyngham v. Shelby,* the Tennessee case under review, is: According to what rule of law should be determined the stockholders' *direct individual* obligations and liabilities to *corporation creditors?*[7] The crucial question here is not an internal one.[8] The common-law rule of partnership liability declared by the Tennessee court to be applicable to the stockholders in an unregistered foreign corporation is analogous to California's statutory rule of proportional individual liability—the latter applying equally to *all* corporations actually doing business there. Cases decided under such a statute, therefore, are, so far as the fundamental problem of the conflict of laws is concerned, persuasive and important precedents. With a single exception, *Risdon Iron and Locomotive Works v. Furness,*[9] the decisions under such statutes hold the stockholders individually liable.[10]

It is well settled as a general common-law principle that if the law of the place of incorporation imposes no direct individual

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[6] For a discussion of the nature of stockholders' corporate (or "quasi-joint") obligations, commonly designated the obligations "of the corporation," see Prof. Wesley N. Hohfeld, Nature of Stockholders' Individual Liability for Corporation Debts (1909) 9 COL. L. REV. 285, 301-308.

[7] For the conflicting rules, see (1909) 9 COL. L. REV. 499-505.

[8] See note 6.

[9] [1905] 2 K. B. 304; affirmed [1906] 1 K. B. 49; criticised (1910) 10 COL. L. REV. 283; (1910) 10 COL. L. REV. 520.

[10] *Pinney v. Nelson* (1901) 183 U. S. 144. A corporation was formed in Colorado with only a limited liability. By the express terms of the charter, the corporation could do business in California. Business was done in that state; and the court held that the stockholder became bound by the laws of the state *specifically mentioned* in the charter; that he would be held individually liable for his proportionate share of the debts of the corporation according to the California statute.

*Peck v. Noee* (1908) 154 Cal. 351, reached a similar result involving a California stockholder in a Nevada corporation doing business in California.

*Thomas v. Wenthworth Hotel Co.* (1910) 158 Cal. 275, sustained the same proposition for an Arizona corporation.

*Thomas v. Matthiessen* (1914) 232 U. S. 221. In this case the corporation by its articles was authorized to do business in California as well as elsewhere, and the defendant stockholder, a citizen and resident of

obligation whatever, the *lex loci contractus*, even if deemed controlling in the first instance, will in fact impose on the stockholders of a foreign or extra-state corporation neither partnership obligations nor any other individual obligations, but on the contrary merely "corporate" or "quasi-joint" obligations.[11] This represents what the common law generally does; but even the common law may, whenever the adoption of the law of the place of incorporation be repugnant to its policy or prejudicial to its interests, depart from the general rule of "comity" and hold the stockholders to unlimited partnership obligations. This, it is submitted, is the chief, if not the only, *ratio decidendi* of a few cases.[12]

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New York, was held liable for his proportionate share of the corporation debts; the action having been brought in the U. S. District Court of New York.

The most recent case decided under this statute is *Provident Gold Mining Co. v. Haynes* (1916) 159 Pac. (Cal.) 155. See a comment in (1916) 26 YALE LAW JOURNAL, 143. This case marks a further step, for no *specific provision* was made for the corporation to do business in California as was made for the four previous cases; nevertheless, a general authorization to do business in the state was given, the corporation being organized to do business in Arizona, or "in any other state or territory as the board of directors may from time to time deem necessary and expedient."

The general question raised by the California statute is becoming of increasing importance. Two cases involving statutes fundamentally similar are: *Leyner Engineering Works v. Kempner* (1908) 163 Fed. 605, decided under a Colorado statute providing for individual liability of stockholders of a foreign corporation because of failure to file a copy of articles of incorporation, etc., and *Chesley v. Soo Lignite Coal Co.* (1909) 121 N. W. (N. D.) 73, decided under a similar state of facts.

[11] See *Bateman v. Service* (1881) L. R. 5 App. Cas. 386, 389, *per* Sir Richard Couch: "But it was contended that the Legislature of Western Australia . . . . enacted that unless a foreign corporation, carrying on business in Western Australia, complied with this Ordinance and was registered according to its provisions, its individual members should be liable to be sued for its debts. It was stated, and properly, that the real question in the case was whether the Western Australian Legislature so enacted.

"In considering that question we may first look at the principle which is laid down by Story. . . . 'In the silence of any positive rule affirming or denying or restraining the operation of foreign laws, Courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy or prejudicial to its interests.'"

[12] (1910) 10 COL. L. REV. 520, 536; *Cleaton v. Emery* (1892) 49 Mo. App. 345 (Corporation chartered in Colorado intending to do business exclusively, or almost exclusively, in Missouri). Gill, J.: "The state

It has been held in some cases that where the corporate existence is effected in another state purely for the purpose of defeating personal liability, the foreign incorporation will be disregarded, so far as individual liability is concerned, in a state where business is transacted.[13]

Somewhat related to this class of cases are those in which a foreign corporation has failed to register, or file its articles, according to state registration statutes, although otherwise not violating the laws or policy of the state in which business is transacted. At least some authorities are inferentially inclined against the principal case, which falls within the class last mentioned, holding, under various registration statutes and sets of facts, that the stockholders are not liable as partners on contracts executed in the name of the corporation.[14] A statute might impose such a liability.[15]

In *Morton v. Haff*[16] an agent who had actually entered into contract for a corporation having, because of failure to file copy of articles, etc., no power to transact business within the state was held personally liable on the ground that the corporation having no power could delegate none to the defendant. In *Cunnyngham v. Shelby,* the stockholder was held liable not as an agent but as a principal. This case, decided apart from

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of Colorado attempted here by this incorporation to create and send out to another state this organized entity, not to do business within its own realm, but to carry on such business altogether in another state. . . . To concede its validity and recognize its existence is to admit authority in another state to direct this commonwealth: in short to yield to Colorado the partial exercise of our state's sovereignty." *Empire Mills v. Olston Grocery Co.* (1891) 15 S. W. (Tex.) 200; *Taylor v. Branham* (1898) 35 Fla. 297; cf. *Merrick v. Brainard* (1860) 38 Barb. (N. Y.) 574 (This case was reversed in 34 N. Y. 208, not on the ground that there was any absence of "power" on part of the *lex loci delicti,* but on grounds of the rules of "comity," etc.).

[13] *Davidson v. Hobson* (1894) 59 Mo. App. 130; see also *Hill v. Beach* (1858) 12 N. J. Eq. 31; *Montgomery v. Forbes* (1889) 148 Mass. 249; *Cleaton v. Emery* (1892) 49 Mo. App. 345.

[14] See *Nat'l Bank v. Spot Cash Coal Co.* (1911) 98 Ark. 59; opinion of Kirby, J. in *Tribble v. Halbert* (1910) 143 Mo. App. 524.

[15] Cf. Va. Code, sec. 1105: "The officers, agents, and employees of any such corporation doing business in this state without a license shall be personally liable to the state for any fines imposed on it, and to any resident of the state having a claim against such a corporation." See also cases cited in note 10, last paragraph.

[16] (1890) 88 Tenn. 427; see also *Raff v. Isham* (1912) 235 Pa. St. 347; *Lasher v. Stinson* (1892) 145 Pa. St. 30.

any statute imposing partnership liability, extends the stockholders' obligations and liabilities a step farther than the agency cases. However, so far as the doctrines of the conflicts of laws are concerned, the principal case is not inconsistent with the principles developed in the evolution of the law governing stockholders' liabilities, inasmuch as the Tennessee court, the *lex loci contractus* and the *lex fori* being identical, pursued its own policy and applied its own fundamental common-law rules, regardless of any rules of "comity" and of the laws of Delaware.

G. S., JR.

TORT ARISING FROM ATTEMPTED FULFILMENT OF CONTRACT.

A recent Minnesota decision[1] presents an interesting question in the tort liability assumed by one who undertakes an employment. The defendant detective agency, being employed to obtain information concerning the conduct of the plaintiff's wife, negligently shadowed another woman, and falsely reported to the plaintiff that his wife's conduct was immoral. The plaintiff in reliance thereon charged his wife with such misconduct, whereupon she left him definitely. The plaintiff now seeks to recover damages for the alienation of his wife's affections resulting from such negligence, expressly waiving recovery of the sum paid for services. The court decided that, in order to recover from a third party for alienating the affections of a spouse, the plaintiff must show active and intentional conduct of defendant in causing such estrangement, and that the modified complaint here stated no cause of action.

Without question the proposition on which the court grounds the dismissal of the suit is correct.[2] Mere negligence is not sufficient to give an action for the common-law tort of alienation of a wife's affections. Yet it is open to question whether the complaint does not state a good cause of action for negligent misfeasance, into which such alienation would enter as a damage element. The plaintiff, says the court, "grounds his action wholly upon the claim that defendant was negligent in the performance of duties which plaintiff employed it to perform."

Whether a duty be undertaken gratuitously or for hire, one

[1] *Lilligren v. Burns International Detective Agency* (1916) 160 N. W. (Minn.) 203.

[2] See *Tasker v. Stanley* (1891) 153 Mass. 148, and cases cited.